

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 140-0803	MPC 89-0703
	)	MPC 122-0803	MPC 90-0703
Respondent	)		MPC 87-0703

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S SECOND MOTION
TO DISMISS SUPERCEDING SPECIFICATION OF CHARGES**

Respondent has filed a second motion to dismiss the Superceding Specification of Charges. This time Respondent argues that he did not receive certain portions of his own records produced by the Board on August 14, 2003, almost a year ago. Respondent characterizes the absence of those portions of the medical records as the withholding of exculpatory evidence by the Attorney General's office. Respondent also argues for dismissal based on his claim that witness interviews of Judith Salatino and Susan Lang were withheld from him. The State views Respondent's second attempt to avoid accountability in these proceedings as meritless and the Board must deny Respondent's motion for the reasons set forth below.

I. THE BOARD DOES NOT HAVE STATUTORY AUTHORITY TO DISMISS THE SUPERCEDING SPECIFICATION OF CHARGES.

The State renews the argument presented in its opposition to Respondent's first motion to dismiss that the Board does not have the authority to dismiss charges. In order for the Board to dismiss the charges, there must be statutory authority for the Board to grant such relief. The rule that has been stated by the Vermont Supreme Court is that "the Board, as an administrative body, 'has only such powers as are expressly conferred by upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.'" *Perry v. Medical Practice Board*, 169 Vt. 399, 403 (1999)(citations omitted). Nowhere in the Board's enabling legislation is the authority to simply dismiss charges. Respondent again has failed to give the Board a legal basis to support his request for dismissal of the charges.

Nor can the Respondent argue that the authority to dismiss charges is "necessarily implied" in order to fully exercise the express powers granted. Indeed, imputing to the Board an implied power to dismiss charges of unprofessional conduct without hearing is in direct derogation of the Board's duty to protect the public. *See Perry*, 169 Vt. at 403 (purpose of the Board's regulation of medical profession is protecting the public). The charges against Respondent are the result of an investigation by a committee of the Board, a determination by the Attorney General's office that there exists a basis for charging unprofessional conduct with a certification by the Board Secretary that such a basis exists. It would not serve the protection of the public if

the Board, without holding a public hearing on charges already made public, could simply dismiss the charges.

II. ALL WITNESS INTERVIEWS HAVE BEEN PRODUCED TO THE RESPONDENT.

Ant witness interviews in possession of the State have been produced to the Respondent including that of Judith Salatino. In its document production to Respondent on or about October 21, 2003, the State produced investigative notes of Phil Ciotti which contained a summary of his conversation with Judith Salatino. State's Exhibit 1. As for any investigative notes of Mr. Ciotti regarding Susan Lang, Mr. Ciotti met with Ms. Lang only once and did not take notes during that meeting. Affidavit of Philip J. Ciotti, (attached hereto).

III. THE STATE HAS NOT WITHHELD EXCULPATORY EVIDENCE.

Respondent asserts that the State has withheld exculpatory evidence because there were portions of Respondent's own records of Judith Salatino missing from a copy of Ms. Salatino's records produced by the Board on August 14, 2003. Even assuming; (1) that Due Process requires the State in an administrative process to produce exculpatory evidence; and, (2) that missing portions of the record are in fact exculpatory, Respondent has not demonstrated, nor could he, that the documents were withheld.

Respondent has had more than adequate access to the records since their seizure on July 18, 2003. The Board copied the Salatino records on July 19, 2003

and hand delivered the copies on July 21, 2003. Affidavit of Margaret A. Langlais, ¶¶ 4,6. Subsequently, the Board made additional copies of Judith Salatino's records and mailed them to Respondent's counsel. Letter of John Howland (attached as Exhibit 2). On August 14, 2003, the Board mailed yet another copy of Ms. Salatino's records to Respondent's counsel. Langlais Aff., ¶7. In addition, the assistant for Respondent's counsel came to the Board offices to review the files and had access to the Salatino file. Ciotti Aff., ¶8. Under Board rules and statute Respondent or his counsel had complete access to the Salatino file at any time.

What is missing from Respondent's withholding claim is any connection between the missing records and the Attorney General's office. The copying that is at issue was performed by the Board. The Board is not an extension of the Attorney General's office but a separate entity. The Attorney General's office acts in the role of prosecutor and the Board is the tribunal before whom the State presents its case. There is simply no evidence that the prosecution has withheld anything from the Respondent

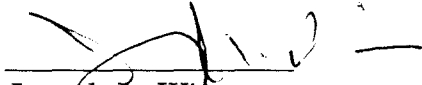
Under these circumstances the Respondent cannot seriously maintain that the Salatino records were withheld from him. Even assuming there was a bureaucratic error in the August 14 production by the Board, Respondent had other copies of the Salatino records which were apparently complete since has asserted that only the August 14 production was in error. Of course, the assumption that the missing portions are the Board's error is a generous one. The missing portions of

the Salatino record could just have easily been misplaced by Respondent or his counsel in the eleven months between the production and the pending motion.

WHEREFORE, the State asks that the Respondent's motion be **DENIED**.

Dated at Montpelier, Vermont this 19th day of July, 2004.

**WILLIAM SORRELL
ATTORNEY GENERAL
STATE OF VERMONT
BY**



Joseph L. Winn
Assistant Attorney General

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re: David S. Chase, M.D.) MPC 15-0203	MPC 110-0803
) MPC 208-1003	MPC 163-0803
) MPC 148-0803	MPC 126-0803
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) MPC 140-0803	MPC 89-0703
) MPC 122-0803	MPC 90-0703
)	MPC 87-0703

AFFIDAVIT OF MARGARET A. LANGLAIS

NOW COMES Margaret A. Langlais and, having been first duly sworn, states as follows:

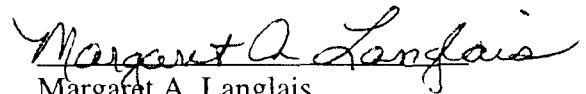
1. The following statements are based upon my personal knowledge, unless otherwise stated.
2. I am employed by the Vermont Board of Medical Practice as Licensing Administrator. I have been with the Board since 2002.
3. On Friday, July 18, 2003, records seized from Dr. Chase's office pursuant to a search warrant were delivered to the offices of the Vermont Board of Medical Practice by Investigator Philip Ciotti.
4. On Saturday, July 19, 2003, I came to the Board of Medical Practice offices and made a complete copy of all the records/documents seized from Dr. Chase's office that included chart numbers 11,104 (Salatino) and 1704 (Lang).
5. On Monday, July 21, 2003, I made a second complete copy of all the records/documents seized from Dr. Chase's office, including chart numbers 11,104 and 1704. I made a second complete copy of the records/documents seized in order to preserve the original records/documents as well as an effort to reduce administrative staff time that would be required to make additional copies, if required, in the future.

6. On Monday, July 21, 2003, a complete copy of all the records/documents seized from Dr. Chase's office that included chart numbers 11,104 (Salatino) and 1704 (Lang) were delivered to Dr. Chase's office located on St. Paul Street, Burlington, VT.

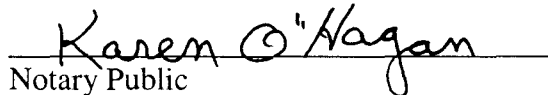
7. On Thursday, August 14, 2003, twenty-three charts, including chart numbers 11,104 (Salatino) and 1704 (Lang) were copied and were provided to Attorney Eric Miller, as requested.

8. At no time did anyone from the Attorney General's office direct me to withhold any documents related to the Superceding Specification of Charges from Dr. Chase or his attorneys.

DATED this 19th day of July, 2004.


Margaret A. Langlais
Affiant

Subscribed and sworn before me on this 19 day of July, 2004.


Notary Public

My commission expires: 7/10/07

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AFFIDAVIT OF PHILIP J. CIOTTI

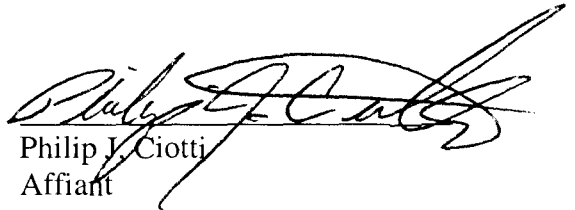
NOW COMES Philip J. Ciotti and, having been first duly sworn, states as follows:

1. The following statements are based upon my personal knowledge, unless otherwise stated.
2. I am employed by the Vermont Board of Medical Practice as an Investigator. I have been so employed since 2001.
3. On September 25, 2003, Investigator Virginia Werneke came to the Vermont Board of Medical Practice offices to utilize a conference for an interview with Susan Lang regarding the Medicaid Fraud Unit's investigation of Dr. Chase.
4. This investigator secured a conference room for this purpose and was invited to sit in on Investigator Wernecke's interview.
5. I sat in on the interview of Ms. Lang in the event I could learn any new information. I routinely have a notebook during the course of any meetings and/or interviews.
6. During the course of the interview, no new information was received from Ms. Lang.
7. I took no notes related to the information provided by Ms. Lang during Investigator Werneke's interview.

8. Additionally, Eric Miller's assistant, Kelley Sammel, came to Vermont Board of Medical Practice offices and spent approximately one-half day reviewing all of Dr. Chase's files that related to the patients named in the Superceding Specification of Charges. The files in question were, and remain, open for inspection by Eric Miller or his representative.

9. At no time did anyone from the Attorney General's office direct me to withhold any documents related to the Superceding Specification of Charges from Dr. Chase or his attorneys.

DATED this 19~~th~~ day of July, 2004.


Philip J. Ciotti
Affiant

Subscribed and sworn before me on this 19 day of July, 2004.

Karen O'Hagan
Notary Public

My commission expires: 2/10/07



Vermont Department of Health
Board of Medical Practice

Agency of Human Services

July 30, 2003

Eric Miller, Esq.
Sheehey Furlong & Behn P.C.
30 Main Street
P.O. Box 56
Burlington, VT 05402-0066
(hand delivered)

RE: MPC 15-0203

Dear Mr. Miller,

Enclosed, please find a copy of Patient Number 2's file (the file of Judith Salatin), per your request.

Sincerely,

John Howland, Jr.
Interim Director

cc: Joseph Winn, Esq.

Enc.

WILLIAM H. SCIRELL
ATTORNEY GENERAL

J. WALLACE MAJLEY, JR.
DEPUTY ATTORNEY GENERAL

WILLIAM E. GUFFIN
CHIEF ASST. ATTORNEY GENERAL



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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER
05609-1001

October 21, 2003

HAND DELIVERED

Eric S. Miller, Esq.
Sheehey, Furlong & Behm
30 Main Street, Gateway Square
P.O. Box 66
Burlington, Vermont 05402-0066

Re: *In re David Chase:*

Dear Eric:

There is apparently some confusion as to what exactly the Board has produced to you with respect to the Specification of Charges based on Helene Nordstrom's complaint. Therefore, in order to ensure that the State is in compliance with Rule 19.1 of the Board, enclosed are documents from the investigative file of Helene Nordstrom. I am sending you these documents on the off chance that they may not have been produced to you earlier. Enclosed are the following:

Email from unknown person to Helene Nordstrom--#0001
Investigative note of Phil Ciotti (6/24/03)-- #0002
Documents from Dr. Morhun re Helene Nordstrom-- #0003-#0012
Affidavit of Patricia Halverson-- #0013-#0014
Article from *Business People Vermont* -- #0015- #0018
Affidavit Kathleen Micheli--#0019 -#0021
Affidavit of Thomas Cavin, M.D. --#0022-#0023
Affidavit of Alan E. Irwin, M.D.-- #0024-#0025
Affidavit of Robert Arsenault--#0026-#0027
Investigative Note of Phil Ciotti (7/15/03)--#0028
Investigative Note of Phil Ciotti (7/18/03)--#0029
Investigative Note of Phil Ciotti (6/30/03)--#0030
Investigative Note of Phil Ciotti (7/11/03)--#0031-#0032

Handwritten Investigative Notes of Phil Ciotti re: Morhun & Devita--
#0033-#0038

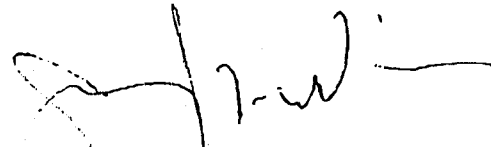
Handwritten notes of Stephen Green-- #0039-#0041

Summary of interview w/ Victoria Oakes--#0042-#0047

Records from Drs. Eriksson & Reid re: Nordstrom--#0048-#0060

You are already in possession of Amy Landry's affidavit and the complaints of those persons I have identified as witnesses. If there are other documents that fall within the requirements of Rule 19.1 that you believe have not been produced, please let me know and the State will produce such documents if they indeed fall within the requirements of the rule.

With respect to the witness list the State has provided to you, there are two changes. First, the State will not be calling Elizabeth Ardale (MPC 130-0803) as a witness nor will the State be filing charges in that case. Second, the case number for Susan Lang was mistakenly identified as MPC131-0803. The case number for Ms. Lang should be MPC148-0803.



Joseph L. Winn
Assistant Attorney General

cc: Phil Ciotti (w/out enclosures)

Whatever they ~~thought~~ indicate by surgeon
want to us

Salatino - long time patient
age 63 thought she needed glasses
~~blurred vision~~ Not trouble at distance
told need surgery right off
CST was done dilated, no retraction for gls.

No dense central

Physiological lens for her age

He showed her 20/100 in both eyes with CST
No clinical cataract w/ret